



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Karl Brothers, Incorporated

File: B-270603

Date: March 29, 1996

John P. Ahlers, Esq., Craig Holley, Esq., Barokas & Martin, for the protester. Col. Nicholas P. Retson, and Capt. Bryant Banes, Department of the Army, and Audrey Liebross, Esq., Small Business Administration, for the agencies. Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester which would not be next in line for award is not an interested party to protest award to an offeror ineligible to compete under the solicitation's mistakenly stated standard industrial classification (SIC) code.

DECISION

Karl Brothers, Incorporated protests the award of a contract to CDC/TAG, Joint Venture, under request for proposals (RFP) No. DAHC 76-94-R-0013, issued by the Department of the Army for military housing maintenance at various installations in Alaska. Karl asserts that the award was improper because it was made on the basis of a size standard other than that set forth in the RFP.

We dismiss the protest.

The RFP was issued on June 6, 1995, as a set-aside for small businesses certified by the Small Business Administration (SBA) to participate in the SBA's 8(a) Program (section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1994)). The RFP contemplated the award of a firm, fixed-price construction requirements contract for a base year with 4 option years. Work included maintenance of family housing quarters and appliance service at Forts Richardson, Wainwright, and Greely, and a separate off-post housing unit in Fairbanks, Alaska.

The agency first offered this requirement to the SBA in May 1994, for competition among eligible 8(a) contractors under standard industrial classification (SIC) code 8744, base maintenance. The size standard for SIC code 8744 contractors is \$20 million. At the request of an SBA representative, the Army reviewed the requirement and changed the SIC code to 1799, base housing maintenance, with a size standard of \$7 million. In June 1995, the SBA again requested the Army to review the requirement for assignment of the appropriate SIC code. After reviewing the requirement, the agency concluded that the 8744 SIC code was more appropriate due to the addition of other work. The Army advised the SBA of the change and the SBA concurred. The SBA also provided a list of offerors with the 8744 SIC code; the list included Karl, the two offerors forming the CDC/TAG joint venture, and a third offeror, American Mechanical, Inc. (AMI). However, when the Army issued the RFP, the applicable SIC code was identified as 1799, and the Army did not change the code reference to SIC code 8744¹ in any of the three amendments issued prior to the closing date. On August 2, the SBA notified the two companies forming the CDC/TAG joint venture of the requirements for joint venture proposals, and that the applicable SIC code was 8744.

Four offerors, including CDC/TAG, Karl, and AMI, submitted proposals by the August 31 closing time for receipt of proposals. The RFP provided for award on the basis of initial proposals, without discussions, and advised that technical factors were more important than price. Award was to be made to the offeror whose proposal was most advantageous to the government.

Based on the evaluation, the agency determined that CDC/TAG's initial proposal, with the highest technical score and the lowest price, \$7,865,491.49, represented the most advantageous offer. This amount represented the base year award. If all four options are awarded, the price of the contract, and the amount which was used for comparative evaluation purposes, will be \$40,413,769.47. Karl's proposed price for the base year was \$11,279,565.99 and \$59,686,917.59 with all options included. The Army issued the notice of award to the SBA on November 17 and, on November 21, the SBA awarded a subcontract to CDC/TAG. Upon receipt of a debriefing letter, Karl filed a protest with the agency challenging the size status and eligibility of CDC/TAG. The Army referred the protest to the SBA, which denied it on November 24. Karl then protested to our Office.

Karl argues that because the RFP restricted the procurement to SIC code 1799 contractors with a size standard of \$7 million, it was improper for the Army to select CDC/TAG, a concern that was ineligible under that SIC code. Karl requests either award to it or a resolicitation with the correct, intended SIC code.

¹It is clear from the record that both the Army and the SBA agree that the appropriate SIC code for this requirement is 8744 and not 1799.

We find that Karl is not an interested party to pursue this protest. Only an "interested party" may protest a federal procurement. Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, Section 21.0(a), 60 Fed. Reg. 40,737, 40,739 (Aug. 10, 1995) (to be codified at 4 C.F.R. § 21.0(a)). Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. Black Hills Refuse Serv., 67 Comp. Gen. 261 (1988), 88-1 CPD ¶ 151.

At the time it submitted its proposal, AMI was an eligible SIC code 1799 contractor. While Karl's proposal was scored at 723 points out of 1000, AMI's proposal was scored at 717 points. The Army found that Karl's and AMI's proposals were technically equivalent, which would make price the determining factor between the two proposals. Since AMI's total proposed price was more than \$4.5 million lower than Karl's, the agency states, it would have awarded the contract to AMI and not to Karl. Thus, Karl would not be in line for the award if we sustained the protest; it therefore is not an interested party. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7.

Moreover, we fail to see how Karl was prejudiced by the award to CDC/TAG. Karl's significantly higher proposed price would have eliminated it from selection consideration regardless of the SIC code used. In this regard, Karl asserts that had it known of the intended SIC code, it could have proposed a joint venture, as did the selected contractor. By joint venturing with a larger firm, Karl states, it could lower its price through the spread of risk, increased resources, bonding ability, and technical expertise. However, Karl has not provided any specific information on how such an arrangement would enable it to eliminate CDC/TAG's approximately 33 percent price advantage of more than \$19 million. On this record, there is simply no showing that competitive prejudice, an essential element of a viable protest, exists with respect to Karl.

The protest is dismissed.

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